AN ESSAY

ON THE

POLITICAL GRADE of the FREE COLOURED POPULATION

UNDER

THE CONSTITUTION OF THE UNITED STATES,

AND

THE CONSTITUTION OF PENNSYLVANIA;

IN THREE PARTS.

BY JOHN F. DENNY, Esq.

"*I have often taken notice that Providence has been pleased to give this one connected country to one united people; a people descended from the same ancestors—speaking the same language—professing the same religion, and attached to the same principles of government.*"—HAMILTON.

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PREFACE.

The writer of the following Essay enjoyed the opportunity of submitting the substance of it to the perusal of the late Chief Justice Marshall, and received from him the flattering acknowledgement subjoined, several months before his decease. He appreciates the privilege of introducing his unpretending commentary upon a difficult section of the Constitution, under a name so renowned for native acuteness and so highly adorned with constitutional learning.

Richmond, October 24, 1834.

Dear Sir—

On my return to this place, from a visit to our mountains, I had the pleasure of finding a copy of your valuable Inquiry into the "political grade of the free-coloured population, under the Constitution of the United States and the Constitution of Pennsylvania," for which I am indebted to you. I have read this Essay with the more pleasure, because the sentiment it conveys appears to me, to be perfectly sound. It is cause of real gratification to perceive, that in the Northern and middle States, the opinion of the intelligent on this delicate subject, on which the Slaveholding States are so sensitive, accords so entirely with that of the South.

Permit me to thank you for this flattering mark of your polite attention, and to assure you that I am, most respectfully,

Your obedient

J. MARSHALL.

PART I.

POLITICAL CONDITION OF THE FREE BLACKS BEFORE THE ADOPTION OF THE CONSTITUTION.

Among the subjects of primary interest to the people of the United States, at present, may be ranked—The rapid increase of the African race within their bounds. To this important theme the publick mind has been attracted, not only by motives of humanity and justice towards a degraded and injured caste, but by a lively principle of self-preservation, also, that sees in *their removal from the land, the only sure hope of permanent domestick security.* Other modes of redress, it is true, have been espoused by some who affect to regard a geographical divorce of the white and black races as replete with cruelty to the latter; but as far as their experiments have yet been made, instead of operating as measures of relief, they have rather threatened to aggravate the sufferings of the depressed class, and to end in civil convulsion. Large districts of the Union are kept in a state of constant anxiety and vigilance by the density of the coloured population, while others have been distracted by their insurrections and made the theatres of the most tragical events. Whatever palliative for these deeds of horrour a sensitive moralist may find, in an abstract view of the rights of human nature, a sense of the publick safety has led to the adoption of a course, in those parts of the country, that betrays but little respect for the maxims of a humane philosophy. Diligent inquiry, we are assured, has, on most occasions, traced the source of these calamities to the instigation and arts of the *free class*, removed from whose influence, the slaves are said to be duly

faithful and submissive, but when exposed to it, easily made the instruments of crime.* The remedy was, therefore, directed against the turbulent libertine; and a system of manumission, requiring the departure of the negro from the State, as the condition of his freedom, aided by a penal code tending to exterminate the black freeman, is, accordingly, the remedial plan now under trial in perhaps most of the Southern States.

The Constitutional bearing of this rigid remedy has been made the subject of much speculation and argument. By some it has been condemned as a palpable violation of the federal rights of free citizens, and by others been vindicated as a necessary measure of self-defence—reposing on an inalienable right, which, in every free government, is sure of protection, and impliedly incorporated in the fundamental law.

Whatever be the just view of this Constitutional question, it is evident, from the subject matter of it, that all the States have a common, though unequal concern, in its decision. The right of one portion depending upon it to rid themselves of an existing evil, and that of the other to resist the incursion of the same evil by cautionary legislation. The aggrieved States, by expelling the noxious caste from their limits, are virtually introducing them upon the soil of the other States, to re-enact there the mischiefs for which they were expelled; and if the former can justify the expulsion by the law of self-defence, surely the latter may resort to protective expedients, upon the same ground. The right of emancipating a slave, upon condition of his leaving the State of his residence, rests upon judicial decisions, and is undisputed; but there is no rule, either of courtesy or law, that makes it obligatory upon any other member of the confederacy to receive the exile; nor do we believe this is pretended. The Constitutional difficulty is supposed to grow altogether out of the *expulsion* of a coloured *freeman*, and to be equally involved in the act of banishment by one State, and the refusal by any other to admit the person banished.

In many of the slave-holding States the right of residence within their jurisdiction, has been denied to the free black, by solemn and

*Letter of Gen. Harper to Sec. of Col. Soc.

severe acts of legislation: while in others of the North, that right is enjoyed by the blacks, unmolested, either upon the precarious authority of publick acquiescence, or the more stable support of their constitutions or laws. In Pennsylvania this question remains undetermined; although it may be considered as pending upon a postponed resolution offered at a late session of her Legislature, when the minds of her citizens were directed to this subject, with a peculiar earnestness, by concerted movements in the slave States. It was then that the attention of the writer was first drawn to this interesting question; and, however extensive the application of his conclusions may prove, it is certain that his research has been chiefly prompted by the exigencies of his own State.

All questions of Constitutional law have a high theoretical importance; but the one now under consideration super-adds loftier claims to cool and unbiased examination, arising out of its practical results. The political and civil rights of millions of native Americans are, to an indefinite extent, involved in it, and therewith, probably, the quietude and prosperity of many of the States of this Union. The writer, therefore, approaches it, he trusts, with a due sense of its magnitude, as well as of the justice and liberality owing to that unfortunate race whose interests it puts so largely at stake.

It may be proper to apprize the reader, in the outset, that the subject of this inquiry is wholly distinct from the questions touching the propriety or policy of Slavery in the United States, and the *expediency* of elevating or depressing them in the scale of rank. Any opinion that may be formed upon these topicks, therefore, is entirely foreign to the subject before us, excepting, indeed, that the principle of humanity may be considered as entering more or less into every discussion falling within the sphere of human rights.

The Federal Constitution is of uniform obligation upon all the States of the Union—and should its provisions be *clearly* violated by the laws or practice of any one or more of the States, the example could have no force in sustaining a similar violation of the instrument by any other State. If, therefore, the free coloured class are entitled to federal privileges in any of the States, and, without being chargeable with any offence inducing a forfeiture of those

privileges, should be banished from their territory, the act of banishment, although proceeding from a sovereign authority, would not justify either of the other States in refusing admittance to the refugees, if it were demanded.

The Constitution, in all such cases, would alone be the governing rule. But if the example cited, be one merely of a *doubtful* infraction of that instrument, and at the same time material to the protection of high publick interests, the dictates of sound policy ought to furnish the rule of action. For instance: Suppose Virginia, for reasons connected with her local welfare, to expel the free coloured race from her soil, and that the outcasts, unaccused of crime, were to seek an asylum in Pennsylvania,—how would that State feel bound to meet the case? It being highly probable that the reception of the debased exiles, within her limits, would be attended with a serious disturbance of her prosperity, and at the same time doubtful that they are recognized as citizens, by the Constitution of the United States, would she yield to their demands? Would she suffer the unity of her aspiring population to be broken by the intermixture of a black and servile caste—at once surrender her sense of dignity, and expose her wide spread peace to the secret machinations of an internal and irreclaimable enemy? We will venture to answer for her, no:—She would adhere to the policy of her early days; and without remitting her efforts in favour of a peeled and dishonoured race, she would be vigilant to preserve the body of her citizens from the pollution of so foreign and threatening an element.

There is no State in the Confederacy more exposed to the incursions of the refuse black inhabitants of others, than Pennsylvania; she has many of the coloured class already in her bosom, and a large part of her domain bordering upon the soil of slavery. Her laws, too, are mild and generous towards these people, and not a few of her worthiest citizens, friendly to their reception. Accordingly, they are daily flowing in upon her—occupying the time of her criminal courts—filling her jails and poor-houses, and sauntering through her towns and villages in misery and want: nor are the eyes of the Commonwealth ever awakened to their numbers, until they have completed, as far as they are capable, a probation-

ary title to citizenship, under the Constitution of the State. That this portraiture is not exaggerated, however it is to be deplored, we appeal even to the cursory observer. By a late report of the *Prison Discipline Society* it appears that in Pennsylvania, where the coloured population composes about 1—35th part of the whole number of inhabitants, more than $\frac{1}{3}$ of the convicts were of the coloured ranks; and at the present day, this latter proportion is doubtless, greatly augmented. That this state of things is a great publick grievance is admitted by all who are friendly to the dignity and prosperity of the Commonwealth; but, strange as it may seem, there are many of her citizens, eminent both for their discernment and legal information, who insist that it is *beyond the Constitutional power of the Legislature;* and consequently, as it is a crescent evil, so is it destined to be a permanent one! With an anxious desire for the personal and national elevation of the African race, we ask, can it be that the Federal Constitution binds so loathsome an excrescence to the vitals of any State in the Union? If so, that charter has certainly failed to secure some of the chief benefits for which it was formed.

That the sovereign States, composing this Union, should voluntarily become parties to a frame of government that would deprive them of the power to guard their respective citizens from the dangers incident to a large influx of black aliens, with whom the difference of complexion alone must ever prevent them becoming incorporated, is exceedingly unlikely; and in the absence of an express and clear provision affirming it in the federal instrument of government which they have adopted, the improbability of the fact should make us distrust any construction leading to such a conclusion.

Those who advocate the political equality of the white and black freeman, in the United States, rest the doctrine upon the 1st clause of the 2d section of the 4th article of the Constitution of the United States, which runs thus: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The term *citizen* is no where defined in the Constitution; it was employed by the Convention as a word of known and established meaning—descriptive of *all who are capa-*

ble of citizenship, in all of the States, with a due regard to the local qualifications required by each State. That such is the true import of the term, may, we think, be gathered, as well from the habits and views of the American community, both before and since the adoption of the Constitution, as from the authority of learned jurists in the country, who are conversant with thl language and spirit of that instrument.

An intermediate order between the free citizen and the slave has existed in most countries where involuntary servitude has prveailed. We have striking examples of it in the free States of antiquity, both under their monarchical and republican forms of government, and at periods signalized by the spread of liberty and learning. Those pertaining to it in the provinces of Greece, and comprehended under the general term *Metic*, formed together a numerous band, and were subject to sundry disabilities withheld from the citizen.* Both in the earlier and latter ages of Rome they were also numerous, and graduated by classes in the scale of servitude; they were distinguished by the term *libertini*, and prior to the introduction of the lenient policy of Justinian were but seldom advanced to the freedom of the city.† This debased order was in these countries generally of the same race, language, and complexion of the superiour classes—enjoying, in the latter state, the privilege of intermarriage with the plebeian ranks, but, on account of their servile birth alone, were retained in a modified servitude. According to the acute Montesquieu the Roman Republick derived its stability, in a great degree, from the restraints imposed upon this middle class; and he commends the political system by which their allegiance to the state was secured in connexion with their crippled freedom.‡

The abolition of villeinage in England and throughout Europe, is, both as to its time and manner, one of the obscurest subjects of modern history. But if we are permitted to take the rigid bondage of the villein, as a guide, in tracing his progress from the servile tenure to the rank of pure freedom, we cannot have much doubt that

*1 Mitford, 355.
†1 Gibb. 168. Just. Inst. title 5
‡Esprit des Loix. p. 253.

he was elevated by enfranchisement in the body politick, but little above the condition of the bondsman. The privileges of state conferred by the law of England upon his issue, surpassed but inconsiderably, if at all, the liberality of the Justinian code towards the offspring of the Roman slave. Besides, it is wholly improbable that a government so intrinsically based upon distinct orders of society as that of England, would, at a period of its history much less favourable to the liberty of the lower classes than the present, advance an enslaved portion of its subjects, at once, from their low estate to a station of entire freedom.*

Were the apportionment of political and civil rights, as it exists in the United States, to be compared with that just noticed in other free countries, it would be easy to discern, in the relative colour of their respective inhabitants, a much stronger reason for assigning a limited freedom only to the emancipated negro here, than mere servility of birth could furnish for imposing a similar restraint upon the freedman there: and when these two reasons operate together, as they frequently do in this country, the comparison loses even the semblance of a parallel.

We do not wish to be esteemed the apologist of slavery, even in its mildest form, but would rejoice to see both "its name and nature withered from the world." The foregoing remarks are made merely to remind the reader that the practice of modified slavery is not peculiar to the American people, but has prevailed in some of the freest and most enlightened ages and nations of the world; and that, as it was maintained by them upon grounds of political expediency alone, we cannot be equally chargeable with criminality, if it be found to rest, with us, upon other causes also, which nature herself has made insurmountable.

The first adventurers to this country, were of the white race—chiefly subjects of the British crown—related by the same blood—speaking the same language,—and ardently united in quest of free and just principles of government. The introduction of the African race among them is well known to have an *extrinsick* origin—to

*The elective franchise is enjoyed by the free people of colour, under the amended constitution of New York, subject to a condition that is not exacted from the white population. 2 Kent. Com. 209

have been the result of *foreign cupidity*—repugnant to the views of freedom that inspired the colonists, and entirely irrespective of the *social principle* that bound them together as a community. The original draught of the Declaration of Independence shews the slave traffick to have been one of the enumerated acts of tyranny, on the part of the mother country, that led to the revolution; and various enactments of the colonies—rendered inoperative by the dissent of the crown—fully attest their uneasiness on account of the growing numbers of this class of their inhabitants. Being admitted unwillingly, they were also classified without favour: instead of being received and treated as members of the community, or even clothed with the right of attaining to that rank, they were *purchased as slaves*, and made subject to the absolute disposal of their owners. Their manumission afterwards, was wholly an act of favour, resting in the discretion of their masters, and, when extended, was never considered to operate as a passport to the civil and political privileges enjoyed by the white society. Indeed, the annals of that early day do not shew that they were ever advanced to that grade of eminence in any of the colonies; although their rights, as freemen, to the value of their personal services, were repeatedly recognized in the courts of justice. The manumitted slave of Greece or Rome might be honoured with the privileges of superiour rank without offending any deeply seated prejudice or feeling in the breasts of those among whom he was elevated. Being, perhaps, often distinguished above them in moral and intellectual qualities, he was discriminated by no physical property that was capable of being permanently associated with his past servitude. Accordingly, we find, among other instances, Æsop, Terence, and Phædrus, who were born in slavery, figuring in the prime of manhood, as the ornaments of science, and instructers of the polished circles of their age. But we may search the early history of the American Republick in vain for an example of any liberated African having risen to a similar grade of equality, in either of their communities. The minds of the colonists were deeply impressed with the principles of universal freedom and philanthropy; and, as their history testifies, in defiance of the temptations of interest and the frowns of the parent government, they exhibited, on many occasions, an earnest and importu-

nate sympathy in behalf of the enslaved Africans. But that history furnishes no evidence that they ever meditated, as a mode of relief, the advancement of that unfortunate race to a footing of equality with the white residents. The sense of justice and humanity due to them, that pervaded the American people, was unaccompanied by any desire to cultivate their communion or intimacy: On the contrary, the natural antipathy of the whites towards them, arising out of the difference of colour, and strengthened by the servility of the negro, was, perhaps, stronger then than now. The prosperous height of the slave-trade had created in the African race a *domestick* foe to the liberty of the colonies, not less to be dreaded, than the tyranny of the mother country, and accordingly served, by the most powerful motives, to cherish a distinction favourable to the ascendency of the white race.

Dangers connected with the increase of the coloured race were early discerned in many of the American Colonies; and on *that account*, as well as from humane feeling, numerous laws were passed against the traffick in slaves.* As early as 1712 the legislative assembly of Pennsylvania passed a law in relation to that traffick, on account of "*dangers of insurrection and murder from a negro population;*" and the petition to the Throne presented by the house of Burgesses of Virginia in 1772, upon the same subject, is replete with the *like sense of danger*. We quote the following passage from it: "The importation of slaves into the colonies from the coast of Africa hath long been considered a trade of great inhumanity, and under its present encouragement, *we have too much reason to fear, will endanger the very existence of your Majesty's American Dominions.* * * * * * * * * "The traffick greatly retards the settlement of the colonies with more *useful inhabitants*, and may, in time, have the most *destructive influence*. We presume to hope that the interest of a few will be disregarded when placed in competition with the *security and happiness of such numbers of your Majesty's dutiful and loyal subjects.*"† We are told, also, by Mr. Jefferson, that, at an early period of the Com-

*See Walsh's Appeal for a reference to these laws, p. 312, &c.—Also, 9 Wheat. Rep., p. 109. (note.)

†1 Tucker's Blackstone. (Append.)

monwealth, a bill was reported by the revisers of the Virginia code, fixing a time for the emancipation of the slaves, and detailing a plan for colonizing them as a separate and independent people.* And it is well known to have been the uniform policy of the colonies, generally, to invite the European to their shores and confer upon him the highest privileges of the State, while the swarthy African was repelled by a penal law, or, when unwillingly admitted at a price, consigned to bondage. Indeed it is idle to enlarge upon such clear points of our colonial history as the universal debasement of the coloured ranks, and the motives of apprehension that contributed to their disfranchisement. "The experiment of improving their "political condition, so far as it has been already made among us," says the learned Judge Tucker, "proves that the emancipated "blacks are not ambitious of civil rights. To prevent the genera- "tion of such an ambition appears necessary; for if it should ever "rear its head, its partizans, as well as its opponents, will be enlisted "by nature herself, and always ranged against each other." Whatever may be thought of the views of expediency here expressed, the authority of this writer will not be rejected as evidence of the early civil disqualifications of the coloured population.

That it was not a sentiment of *humanity merely*, that prompted the colonial regulations against the slave-trade, is evident from another consideration. It is a well attested fact, that some of the most enlightened men, in those sections of the country where the evils of that trade were most prevalent, espoused and avowed the opinion that the white and black races are physically and morally distinct—the inferiority of the latter being supposed to unfit them alike for self-government and the refined enjoyments of an advanced state of society. Such was obviously the leaning of Mr. Jefferson's judgement, as may be seen from his critical speculations upon the relative endowments of the two races, in his "Notes on Virginia;" and there is respectable authority for believing, that this dogma carries back its origin to the first attempts of British avarice to enslave the Africans upon the soil of the colonies. To what extent this philosophical distinction actually obtained, may be variously conjec-

*Notes on Virginia.

tured; but when we consider the usual influence of great names in moulding publick opinion, and the immense weight of private interests connected with slavery that must have favoured its propagation, it would not seem unreasonable to infer that the doctrine won many advocates.

The broad principle avowed in the Declaration of Independence, that "all men are created free and equal," &c., has been pronounced not only an emphatick rebuke of slavery throughout the world, but an act of keen self-reproach against the American people, in proportion to their reluctance or indolence in promoting its abolition upon their own territory. It is a mistake to suppose that the band of patriots who promulged that noble manifesto in the cause of human rights, meant to inculcate the principle of *immediate emancipation*, and the introduction of equal freedom among the white and black races of the colonies. Such an opinion, indeed, seems to have gained some currency, both at home and abroad: it is the favourite text of the ardent abolitionist among ourselves, who, in the height of a laudable, but misdirected zeal, is striving to achieve what the voice of nature and the impotency of his best efforts unite in proving to be unattainable; and the choice theme of agitators under a foreign government, who are seeking the renown of Philanthropists by malignant tirades against the institution of slavery here, while the working classes of their own land are quietly suffered to remain in a state of subjection to their employers three fold more galling than the bondage of the American negro.* The Declaration of Independence was the act of the *white* population, performed by *their* representatives; and although the general proposition which it proclaims in favour of human freedom, *liberally* embraces the *whole race of man*, yet, it is evident, as well from the tenour of the instrument itself, as from the tone of publick feeling prevalent in the colonies at the time, that its *true constructive reference* is to the relation between the American people, *nationally considered*, or any other political community, and the form or principles of government which they have, by nature, a right to adopt. The subject of domestick relations, or of private property, was not within the design or authority of the body

*See Quart. Review, no. 89.

that framed and published the paper, and had any act been done, by it, with a clear tendency to the alteration or disturbance of these objects, it would certainly have met with a speedy and unequivocal reversal from the constituent power.

We have no authentick record either to prove or disprove the participation of the free blacks in the election of deputies to the conventions that formed the several State Constitutions after the Declaration of Independence; but the inferiour condition of that class, as already noticed, is conclusive evidence, that in many of the States they were not admitted to any share in the establishment of those systems of government. Such being the fact, the question presents itself—is their equality, with the whites, recognized in the State Constitutions? These instruments of government, having been formed upon the known sentiments of the community, and the pre-existing relation of its members, ought not to be construed so as to violate those sentiments, or derange those relations, without a specifick reference to them; and the rule is familiar, that a general term may have a restrictive meaning when the nature of the case is capable of it, and such meaning best harmonizes with the antecedent views and present practice of the party concerned. Including the State of Georgia, where a fraction only of the coloured population is comprised in the constituent mass, there are fourteen states out of the twenty-five, whose constitutions, by express language, limit the distinguishing privilege of citizenship—the right of suffrage—to the *white* freeman, exclusively. In the constitutions of the other states south of the Potomack, where rigorous laws attest the disfranchisement of the coloured man, the term *freeman*, or *free inhabitant*, is used to designate the electoral body: these terms must consequently be limited in their application to the *white population;* otherwise those constitutions and laws would conflict in spirit. "In the slave-holding states," says a sensible writer, "the free "blacks do, indeed, labour under civil incapacities; and the policy "of denying them the higher privileges of citizenship, is impera-"tive"* In addition to other deprivations, they are disqualified to hold offices of trust or profit, to sit as jurors, or to bear testimony

*Mr. Walsh—see his "Appeal," p. 395 and Letters on Col. Society by M. Carey, 1832.

in courts of law or equity, affecting the interests of a white suitor. To apply the term *citizen*, to one labouring under such material disabilities would certainly be a perversion of its just import. In the majority of the non-slave-holding States, the numbers of the coloured class were too inconsiderable to merit special notice in their constitutions: their political grade was therefore left to be fixed by popular sentiment; and we need hardly add, that although they live in the enjoyment of some portion of civil and religious freedom, they are deprived, in all those States, of the higher privileges belonging to native or naturalized white citizens. Events of a serious character, and not unfrequent occurrence, occasioned by an inconsiderate zeal for the welfare of the slave, serve to evince the lively feelings of repugnance, that, at present, alienate and promise a permanent separation of the white and black races in that quarter of the Union.

Such are the facts and reflections that have occurred to us upon the first branch of this inquiry; and, if the subject does not abound in written positive proof, still, the evidence is such as to impress the mind, unswayed by a partizan spirit, forcibly with the conclusion, that at no period, prior to the adoption of the federal constitution, were the free coloured people of these States admitted to an equal share of political power and privileges with the white inhabitants.

PART II.

POLITICAL RIGHTS OF THE FREE BLACKS UNDER THE FEDERAL CONSTITUTION.

"In democracies," says a historian already cited, speaking of the Grecian Governments, "the supreme power was nominally vested "in all the people, yet, those called the people, who exclusively "shared that power, were scarcely a tenth part of the men of "State." The same remark is applicable, in a degree, to the government of the United States: it was nominally framed by all the people; yet it is indisputable, that a large class, residents of the soil, had no agency, either direct or indirect, in its formation; consequently, the privileges which the constitution imparts, in the absence of any specifick provision in behalf of this disfranchised class, can be considered applicable to those only who composed the sovereignty from which it emanated. The evidence of the exclusion of the coloured ranks, at the formation and adoption of the Federal Constitution, varies in character but little from that already collated in relation to their political pretensions, under the earlier governments of the States. The constitution was formed by a convention of delegates from the several States, who derived their commissions from the legislative power—a power, which the Constitutional polity, the legislation and practice of the States concur in shewing the black population had no share in appointing. We have already endeavoured to shew that a different opinion would be irreconcilable with the constant views and policy of the whole American community. The coloured class, then, having no political rights on the score of constituting a portion of the sovereign power at the formation of the general government,—

we have next to inquire, whether, in the charter of government then formed, there is any *specifick provision* bestowing upon them the rights and privileges of the State?

By the clause of the federal constitution quoted in the first part of this ESSAY, national *privileges and immunities* are guarantied to the *citizens* of the States, respectively; but, as already said, we are not furnished, by that instrument, with any description of the persons bearing this character. The reason of this omission is found in the right of each State to prescribe its own conditions of citizenship; and as the States differ in their regulations upon this subject, an exact definition, excluding their differences and adopting only their points of agreement, was, probably, deemed by the convention equally impracticable and unnecessary. That this is an exclusive right of the States is not only attested by their uniform practice, but admitted by the clear language of the Constitution. It is provided in the first article of the constitution, that "the electors in each State shall have the qualifications requisite for *electors of the most numerous branch of the State Legislature;*" and in the second article, "each State shall appoint *in such manner as the legislature thereof may direct*" the electors of President and Vice President. These passages plainly shew that the phrase *privileges and immunities*, in the clause under consideration, cannot be expounded to embrace that primary qualification of the citizen—the *electoral right*,—but must be viewed as descriptive, merely, of certain *local advantages incident to citizenship already acquired under the State laws:* otherwise the laws of one State might dictate the terms of citizenship in every other. In this sense, these *privileges and immunities* are conferred upon all who are citizens of any of the States and *have no inherent or conventional incapacity to become citizens in them all.* The character thus created by the joint operation of the State and Federal laws is, properly, a FEDERAL CITIZEN—an appellative, comprising all who are citizens of either of the States by birth or naturalization, and excluding all whom *either of the States may have placed under disabilities, whatever political favours the same class may enjoy under the laws of other States.* By this construction no violence is done to the language of the constitution, while its spirit is harmonized

with the prevailing state of publick sentiment, the uniformly discriminating policy of the States upon this subject, and their discrepant legislation respecting the right of the free blacks from a sister State to enter within the limits of their respective jurisdictions.*

Nor is this view of the constitution objectionable on the score of novelty: it has the sanction of the most enlightened authority in the country. "The article in the constitution of the United States" says Chancellor Kent, "declaring that citizens of each State are "entitled to all the privileges and immunities of citizens in the sev- "eral States, applies only to *natural-born or duly naturalized citi- "zens*; and if they remove from one State to another, they are "entitled to the privileges that persons of the same description are "entitled to in the State to which the removal is made, and to none "other. If, therefore, for instance, free persons of colour are not "entitled to *vote* in Carolina, free persons of colour emigrating there, "from a northern State, would not be entitled to vote."† The *construction* here adopted by the learned commentator is equally explicit and just; but the *illustration* we cannot help thinking inaccurate, and opposed, in part, to an opinion elsewhere expressed by the author in the same treatise. The word *privilege*, in the constitution, was certainly not intended to embrace the *elective franchise*, but only certain accidents of that right, growing out of local laws or usages. The clause in which it is found must be reconciled with the provisions of the 1st and 2d articles before cited, and construed, therefore, with a due subjection to the peculiar laws of the States, fixing the qualifications of citizenship; but the things which the term imports are unconditionally bestowed, by the constitution, upon persons already supposed to be, under those laws, in the enjoyment of the electoral right. The various advantages implied in the phrase *privileges and immunities* it would be difficult to specify. Judicial decisions have placed within its meaning, the license of acquiring and holding property, the exemption of that property from unequal taxation, and the prefered rights of creditors in the distribution

*In Ohio, Delaware, Missouri, Virginia, North Carolina and Georgia, there are rigourous laws for the exclusion of the coloured population of other States.

†2 Kent. Com. p. 71.

of the estate of a deceased debtor.* But the constitution imparts to *no description* of people, whether white or black, in either of the States, the *right of voting* in any other State; although it *infallibly secures* the *privileges and immunities* of each State to the *citizens of all.* We concur in the opinion of the author, that these federal advantages are confined to "*natural-born or duly naturalized citizens,*" but for reasons, in part, already stated, we must dissent from the implication in the extract, that "*free persons of colour*" come under that description. If they are included in it, why are they not admitted to the privileges enjoyed by the whites of the same class, throughout the bounds of the Union? To deny the propriety of their exclusion from those privileges, is to charge the majority of the nation with a continual violation of its constitutional law. Indeed, the general sense of the quotation we have made, may be moulded into a syllogism favourable to the sound doctrine, thus: The privileges and immunities of the federal constitution apply only to natural-born or duly naturalized citizens—but free persons of colour are denied them in several of the States—therefore, free persons of colour are not such citizens. It is with pleasure we acknowledge the high authority and general correctness of the works of this distinguished jurist; nor can we, with any but a frail confidence, venture to question the soundness of any of his constitutional views. Our dependence is on the common lot of the most enlightened and acute minds—a failure to preserve, in a general treatise, technical accuracy upon topicks incidentally discussed.

This inapt illustration of the chancellor seems to have misled Judge Jay in his strictures upon the opinion of the court in Prudence Crandall's case;† but the views of this writer will be more fully noticed in the sequel.

The foregoing interpretation of the clause in question is further strengthened by the authority of Justice Story in his valuable "Commentaries on the Constitution of the United States." "The intention of this clause," says that writer, "was to confer on the "*citizens* of *each State*, if one may so say, a *general citizenship;*

*Exparte Bollman and Swartwout, 4 Cranch, 114—129, Sergt's. Constitutional Law, 384.

†Jay's Inquiry, p. 40-41.

"and to communicate all the privileges and immunities which the "*citizens* of the same State would be entitled to under the like cir- "cumstances."* According to this view of a very able expositor, the claimants of the privileges in question, are invested with a *federal citizenship*, and classed with the *citizens* of the State to which they have removed—advantages that have a necessary dependence upon the municipal laws of the States, and cannot be predicated of the *free coloured inhabitants*, who, in *all* of the States, are ranked *below the citizens*, and, by many of them, denied the humble privilege of *ingress*, permissively enjoyed by the *alien*. The closing phraseology of this definition seems to affect its precision of meaning; but whether the qualifying "*circumstances*" mentioned, refer to the reciprocal rights of the citizens of different States, or the restraints incident to a residence in any of them not sufficiently prolonged to acquire the higher privileges of citizenship, is wholly unimportant to the coloured race. The phrase has express allusion to *citizens* only, and is inapplicable to any who labour under a *disability of caste that unfits them for the attainment of political privileges* in many of the States;—consequently, it cannot be received as descriptive of the condition of the *free black*.

In collecting the various authorities upon the construction of this clause of the constitution, we cannot omit that of the learned Mr. Rawle, in his "View of the Constitution,"—a work of very superiour merit. "The citizens of each State," he informs us, "con- "stituted the citizens of the United States when the constitution was "adopted. The rights which appertained to them, as citizens of "these respective commonwealths, accompanied them in the forma- "tion of the great compound commonwealth which ensued;" he adds, "*every person* born within the United States, its territories "or districts, whether the parents are citizens or aliens, is a natural "born citizen, according to the sense of the constitution, and enti- "tled to all the rights and privileges appertaining to that capacity." We have here a lucid exhibition of the true doctrine—the phrase *every person* being limited to the *white* population; and that this limitation was intended by the writer, is obvious, from the general

*3 Story's Com. p. 675.

proposition with which the passage is introduced, viz: "Those "only who compose the people and *partake of the sovereignty* are "*citizens:* they alone can *elect* and are *capable of being elected to* "*publick offices*, and of course they alone can exercise authority "within the community." It is extremely doubtful that the coloured freeman has ever been elevated, by legal provision, to unqualified citizenship, in any State of the Union; and we have met with no one who is prepared to maintain that he has, in the sense of this author, so shared in the sovereignty of any of the American Governments—General or State—as to *entitle* him to that rank. We have already adduced ample historical evidence to establish the negative of this point; and it is inconsistent with the limits of this ESSAY to swell the mass of mere corroborative proof.

It is urged by some, that the term *citizen*, is applicable to *all the inhabitants* of the States, whatever may be their strict relation to the government; and that the *privileges* secured to them, are such only as the State concerned bestows upon that *class of its residents to which the claimants belong*. If this be the true construction, it is equally opposed to the doctrine combatted; for it recognizes the inferiour grade of the free blacks, and the authority of the States to place them under civil and political disabilities. But we cannot adopt this construction, for two reasons of considerable weight: First—the clause in the constitution was manifestly intended to confer a *benefit* upon all within its range; but such cannot be its effect towards the coloured race, who, instead of bearing with them the title to privileges in their migration from the Northern to the Southern States, contract, on the contrary, a liability to the most onerous and depressing disqualifications. Secondly—the operation of the clause is co-extensive with the republick—obligatory upon all the States; but, in several of the States, the free coloured people of their confederates are prohibited the right of *ingress*, by expulsive and penal legislation. This definition of the word *citizen*, moreover, is not in accordance with that of standard writers on government. The "*jus eximium civitatis*," as Cicero denominates it in his oration against Verres, and which distinguished the Roman *civis*, comprehended the *whole circle of publick dignities and private privileges*. But in the most flourishing days of the empire, *many* of the provincial

inhabitants of the Roman State, were *incapable of attaining to this superiour grade of freedom.* According to Sidney, "*freeholders, who have their votes*, are properly *cives* members of the commonwealth, in distinction from those who are only *incolæ* or *inhabitants*, slaves, and such as being under their parents, are not yet free."* Here, *entire freedom* and the *right of voting*, are specified as indispensable properties of the citizen; which shews the abuse of the epithet when bestowed upon any disfranchised class, who are, technically and accurately speaking, inhabitants only. The same distinction is noted by Vattel: "The citizens," he informs us, "are the members of the civil society: bound to this society by "certain duties, and subject to its authority, they equally participate "in its advantages. The perpetual inhabitants are those who have "received the right of a perpetual residence. They are a *kind of* "*citizens of inferiour order*, and are united and subject to the "society, *without participating in all its advantages.*"†

The great fallacy consists in supposing that the Federal Constitution has, of itself, created a *new citizen*, distinct from the citizen under the State Governments,—whereas, it only clothes the State citizen with national privileges, and exacts, in return, his allegiance to the General Government.

The corresponding section in the Articles of Confederation, it is admitted, betrays singular inattention to verbal accuracy—a confusion of language that might, at some future day, have led to a serious disturbance of the Government. The clause analagous to the one cited from the constitution, runs thus: "The free inhabitants "of each of these States, paupers, vagabonds and fugitives from jus-"tice excepted, shall be entitled to all the privileges and immunities "of free citizens in the several States." Now, unless the phrase *free inhabitant* here, be taken as synonymous with *citizen*, the passage would have invested the Federal Power, with a controlling authority over the laws of the States regulating the political grade of their several classes of inhabitants—an authority which the States never could have surrendered, consistently, with the duty of self-guardianship. Taken subject to this construction, the clause is sub-

*Sidney on Government, vol. 2, p. 312.
†Law of Nat. B. 1 ch. 19.—See also Dr. Webster's definition.

stantially the same with that of the constitution, and consequently, can shed no light upon its meaning with regard to the description of persons under view.

Upon this provision of the old government, a learned writer, before alluded to, who has recently favoured the publick with a brief argument upon the question here examined, remarks: "While these articles were under consideration in Congress, it appears from the "journals, that on the 25th of June, 1778, the delegates from South "Carolina moved the following amendment, *in behalf of their State:* "'In article fourth, between the words free inhabitant, insert WHITE. "Passed in the negative---ayes 2 States; nays 8 States---1 State "divided.' Here then, was a solemn decision of the revolutionary "Congress, *that free negroes should be entitled to all the privileges "and immunities of free citizens in the several States.*"* In this opinion, positively expressed as it is, we cannot concur. Indeed, the *partial application* of the proposed amendment, if the language may be so understood, was alone sufficient, without stopping to enquire for any other reason, to ensure its rejection. The government, then in process of creation, was designed for the equal benefit of all the States, and serious matter of complaint would have been furnished by the introduction among its provisions, of any clause for the special advantage of either. But, understanding the language of the movers, "*in behalf of their State,*" as referring, merely, to the source of the motion to amend, there is a still better reason for the negative decision upon it, to be found in the relative authority of the confederated government and the separate State sovereignties. Prior to the passage of the naturalization laws of Congress, the States reserved to themselves the right of defining their own terms of citizenship, and do yet retain, upon this subject, a concurrent power, to some extent, with the General Government. The power which they retain is *exclusive* in reference to that branch of its action involved in this rejected amendment. The coloured population enjoys various privileges in various States, and may, at the option of the sovereign power in either of them, be advanced to the eminence of the white native freeman. This authority was not

*Jay's Inquiry, p. 42. The tone and language of the writer would be better adapted to an *affirmative decision on a motion to insert the word* BLACK.

relinquished either by the compact that resulted in the articles of confederation, or by the later or more generous one on the part of the States that produced the present constitution. If, therefore, the political bodies entrusted with the digest of these frames of government had ventured to engraft among their powers this distinct reservation of the States, the act might have been disowned by the States as a clear invasion of their rights, and would, in all probability, have been so met. Had the word *white* been inserted in the article, according to the proposed amendment, the States might never have been able, consistently with the provision, to elevate their coloured inhabitants to the enjoyment of perfect citizenship—a measure that, at this day, is not without numerous and ardent advocates, in many of them. Whereas, by the suppression of the qualifying word, each member of the confederacy was left to its own discretion on a point plainly embraced by its reserved powers. From these considerations, it is inferrible, that the clause of the Articles of Confederation in question, was not, according to the judgement of the writer just quoted, intended to comprise "*free negroes*," but was left by the framers of the instrument like its corresponding clause in the constitution—subject to such exposition as would be most compatible with the laws and practice of the States, and the true relations of the constituent members of the compound government.

To this view of the subject it has been objected from another quarter, that the constitution, in apportioning the representation among the States according to the "*whole number of free persons*," virtually bestowed a general citizenship to the extent of the enumeration.* Now, although the omission of any class of the people by the law fixing the constituent body may be fairly regarded as a political disfranchisement of that class—as in the Constitution of Georgia—yet it does not follow, that all who are included in that body, whether by a general or specifick description, belong to the rank of *citizens*; and to this extent the argument must go. It is founded upon the erroneous notion, that all who constitute the basis of its representation are *ipso facto* entitled to choose representatives. The wise men who formed the constitution had neither the inclination

*Review of Judge Dagget's charge in Crandall's case, by "Lysias," in Nat. Gaz, for Nov. 1833.

nor the power to interfere with the electoral body of the States, nor to distinguish, by superiour privileges, any class of the collective community. But, independent of this fact, the spirit of the objection here would obviously ascribe the highest qualification of the citizen, not only to *indented servants*, and *resident aliens*, but to three fifths of the *slaves*, also, who are equally included in the federal numbers—a conclusion at which no rational view of the government can ever arrive. It was wholly foreign to the object of this constitutional provision to designate those who were to have an active participation in the government: it is *avowedly* not confined to either the *citizens* or *free inhabitants*, but, with one exception, embraces persons of *every rank and description*. The mere residents of a country, bound only by a temporary fealty, have personal rights, and may have rights of property, requiring, and therefore entitled to receive the protection of the government and laws—it is proper, therefore, that they should not be overlooked in adjusting the rule of representation. Such is the principle upon which the liberal rule of the Federal Constitution is based; its purpose was to secure to the States, an influence in the popular branch of the legislature—according to their *number of inhabitants*, *respectively*, without the most distant reference to the political rights or privileges of any class of their population.

Equally fallacious is the pretence that the liability of coloured freemen to taxation, coupled with their right of acquiring and holding properity, constitutes them citizens.* These incidents, it is true, may, by the common law, be regarded as attributes of citizenship; but that law, it has been judicially decided, is but an imperfect criterion of alienage in this country;† and in most of the States, the alien, we believe, is subject to taxation and the duty of bearing arms, and enjoys the privileges mentioned with regard to property, but has no claim to the higher and more valuable rights of the *citizen*. Every just government extends the arm of protection over all its inhabitants, and they, in return, owe it, according to their character, natural or local allegiance, the violation of either of which is

*Jay's Inquiry, p. 44.

†Stewart vs. Foster, 2 Binn. 118.

punishable as treason:* but still, this relationship of the parties is considered in every sound treatise upon national law, as distinct from that between the State and citizen. The capacities allowed to the alien in the United States are peculiar, and serve to contrast the generous policy of a youthful and free government with the jealous restraints of a feudal age which time only consecrates under a monarchy.

The view here contended for, derives support, also, from the tenour of the federal legislation. The naturalization law of 1802 that was passed by congress in execution of the power confided to that body by the constitution, is expressly limited to aliens of the *white* race. The language of the first section is, "Any alien, being a "free *white* person, may be admitted to become a citizen of the "United States, or any of them, on the following conditions," &c. Thus, the *complexion* of the alien is made an essential pre-requisite to his admission to the rights of a citizen, in a mode sanctioned by the constitution, and that bestows the character as perfectly as birth; how then can birth impart the character when the *complexion here required, is wanting?* It has been the uniform policy of the United States to encourage emigration; and if the coloured freeman can, under the constitution, succeed by nativity to the rights and immunities of citizenship, the spirit of that instrument is certainly not manifest in the exclusion of the foreigner from the same benefits, by naturalization, on account of his having the *same colour*. The law just referred to affords unequivocal evidence that, in the judgement of the law-making power, at least, the colour of the African race is a *constitutional barrier* to their admission to the rank of citizens, in the United States.

Concurrent testimony upon this head is furnished by the act of congress of 1804, providing a temporary government for the Louisiana Territory. By this law the same distinction of the races is recognized, and the civil privileges of the Territory are confined to the "free male *white*" residents. The 9th section provides that "all free male *white* persons who are house-keepers and who shall "have resided one year, at least, in the said Territory, shall be

*1 East. Pl. Cr. ch. 2.

"required to serve as grand and petit jurors in the courts of the "said Territory," &c. Now there is nothing in the language of the constitution, respecting the publick domain, that authorizes this discrimination in favour of the white race; but it was doubtless the belief of the legislature that passed the law, that the plain sense of the instrument approved the discrimination; and it is with a view to this fact, only, that the case is cited. Regarding this high legislative authority as unfolding the true spirit of the constitution, how does the genius of the statute quoted comport with the political equality of the two races, under the immediate government of the constitution? Is there credulity to believe that a charter of government would, without express words, sanction a *partial* distribution *only* of State privileges in one of its territorial districts, whose inhabitants were soon to be incorporated, indiscriminately, with the national mass of citizens, if others, *standing in the order of the disfranchised class*, are entitled, by the provisions of the charter itself, to a full share of those privileges? Any construction of the constitution, involving so flagrant an incongruity, must ever be received, if at all, with many scruples of distrust. This evidence is corroborated by the act of 1803, passed to incorporate the city of Washington. In providing for the election of the council the right of voting is expressly limited, by the law, to the *white* population. It is worthy of observation that this act of preference prevails within a district subject to the *exclusive* and *permanent* legislation of the federal power, and cannot, therefore, be viewed in the light of a concession to the prejudices of the inhabitants, who, like those of a territory, were soon to acquire the right of establishing the distinction by a sovereign government of their own, over the same theatre.

A looser phraseology has crept into other enactments of Congress, but, as will appear on examination, without any material bearing upon the question at issue. The act of 28th Feb. 1803, passed "to prevent the importation of certain persons into certain States," &c., provides for the punishment of any person who shall "import "or bring any negro, mulatto, or other person of colour, *not* being "a native, a *citizen*, or registered seaman *of the United States*, &c., "into any port or place of the United States, situated in any State

"which, by law, has prohibited or shall prohibit the admission or "importation of such negro," &c.* The inference drawn on a hasty perusal of this passage is, that the subjects of importation described, although *persons of colour*, may, also, be CITIZENS *of the United States*. A careful examination of the whole law will prove this inference to be incorrect. The act was passed under the power conferred upon congress by the 1st clause of the 2d section of the constitution, and is pointedly directed against the *slave traffick:* the crime which it denounces is not *migration*, but *forcible importation for objects of slavery*—the penalty which it threatens is held in terrour over the *man-stealer*, and not over the *voluntary emigrant*. It is farther to be observed, that the persons subject to be imported, in violation of its provisions, must be such as the States concerned have *declared by law, their unwillingness to admit;* consequently, they cannot be *citizens* of the other States, according to the *constitutional description of the term*—as no State in the Union has power to exclude, from its limits, the *citizens* of the other States—the right of ingress and egress, throughout the bounds of the confederacy, being unquestionably among the privileges secured by the Federal Constitution to all who are State citizens, within its meaning.† The whole object and tenour of the act, therefore, shews the phrase *citizen of the United States* to be redundant and expletive, and make it unnecessary to dwell upon the grammatical unfairness of ascribing citizenship to a class, by language, of distinct *negation*.

The joint resolution of the Senate and House of Representatives, admitting Missouri into the Union, is, perhaps, deserving of more attention. When that exciting subject was under debate in the publick councils, the question here discussed was embraced in it, and elicited much zeal and ingenuity on both sides. On the application of the people of Missouri, a law was passed, by congress, for their incorporation into the Union, as a State, on the usual *republican principles*. When the constitution of the inchoate State, was presented for acceptance, it became a question, whether, in that instru-

*3 U. S. Laws, p. 529.

†4 John. ch. R. 430.

ment, those principles were complied with? It was urged that the 4th article and 26th section, which directed the legislature of the State, "to prevent, by law, *free negroes or mulattoes from coming to and settling in the State*," was repugnant to the clause of the constitution of the United States, now under consideration, and a violation of the rights of the citizens of the several States. After being made the subject of much harsh and critical comment, the objectionable clause was referred to a committee of three, of which the venerable and acute Mr. Loundes was chairman.* The report of this committee was favourable to the republican spirit of the referred clause, but it avoids a decision of the present question, by remitting it as one of "nice and difficult inquiry to judicial cognizance." The committee, however, indulged in some general views with regard to it, which, on account of the high respectability of their source, we submit to the reader in the following extract from the report: "Of all the articles in our constitution," says the committee, "there is, probably, not one more difficult to construe well, than "that which gives to the citizens of each State, the privileges and "immunities of the several States; there is not one, attention to "whose spirit, is more necessary to the convenient and beneficial con-"nection of the States; nor one of which too loose a construction "would, more completely, break down their defensive power, and "lead, more directly, to their consolidation. This much, indeed, "seems to be *settled by the established constitutions of States in "every section of our Union: that a State has a right to dis-"criminate between the white and the black man, both in respect "to political and civil privileges, though both be citizens of "another State: to give to one, for instance, the right of voting "and of serving on juries, which it refuses to the other.* How "far this discrimination may be carried, is obviously a matter of "nice and difficult inquiry."† According to this testimony, the grade of the *free coloured man*, in the American community, is depressed greatly below that of the *white citizen:* he is adjudged

*The committee consisted of Mr. Loundes, Mr. Sergeant and Mr. Smith, but the report was admitted, by the chairman, to have received the assent of the *majority* only.

†Nile's Reg. vol. 19, p, 206-7.

to be subject both to civil and political disabilities in all the States, at the option of the ruling power, no matter what rights or privileges he may have enjoyed, as a resident, of any of them; while the native or naturalized *white man* is, constitutionally, exempt from all such liability. The committee, it is true, acknowledges that the debated clause had received, from others, a construction applicable "to *such* free negroes and mulattoes as are *citizens of the United* "*States*, and that their exclusion had been deemed repugnant to the "Federal Constitution;" but as there is a subsequent reference in the report, to the large class of free negroes and mulattoes who *cannot be considered as the citizens of any State*, it is not easy to perceive the grounds of the distinction thus assumed, or to reconcile the language in which it is stated, with the strong and explicit terms of the passage previously cited. While we confess some perplexity here, we cannot help suspecting, that the committee may have, inconsiderately, yielded to a distinction that owed its origin less to a calm study of the constitution than to the ardour of debate. The soundness of the report, however, may not be considered as in need even of this apology. For, in the first place, there are many individuals in the country, of mixed blood, who exhibit so remote and undefined a connection with the debased class, as to claim, in their behalf, a relaxation of the constitutional rule. These persons, it would not seem improper, to protect against the contemplated legislation of the new State, and accordingly, they may have been included, by the committee, in the privileged mass. In the second place, coloured seamen in the employment of the general government, although liable to the restraint meditated by the Constitution of Missouri, do still, in *some sense*, fall within the description of *citizens of the United States*, and the use of the phrase, therefore, inapt as its connection may be, in the report, on account of that liability, cannot be considered as wholly unjustifiable. We reject the idea, altogether, that the statesmen on this committee could have been misled by the notion, that the regulations of any one or more of the States, upon the subject of citizenship, could at all effect the distribution of its privileges in the remaining States. Indeed, the general tenour of the report being so clearly confirmatory of the doctrine here advanced, a slight incongruity in its language merits,

only, a cursory consideration. The resolution subjoined to this report was superseded by a joint resolution of the two houses, which provided, that the obnoxious clause should be retained in the new State constitution subject to the condition "that it shall never be "construed so as to deprive any citizen of any State of the privile- "ges or immunities to which he is entitled as a citizen of the United "States." In this peaceful adjustment of the controversy there was, *professedly, no* legislative *decision* upon the *federal bearing of the clause.* That question was suffered to remain as it was found. If the resolution adopted, assert the political claims of the coloured race, the Constitution of Missouri, with more boldness, resists them. The restriction imposed upon the construction of the clause, merely reserves the rights of *citizens;* and who ever doubted that a new State, by the very act of acceding to the federal league, voluntarily submits to this limitation of its authority? The termination of this embarrassing subject, by so happy a compromise, restored the harmony of the country; but it left the question here considered, undetermined, and where the committee had placed it—before the judicial forum.

In the two instances last noticed, nothing of weight can be extracted from the action of congress in relation to the subject of this inquiry; the problem is scarcely touched. But in the laws *previously* cited we have direct legislative decisions upon the very subject matter,—*an unequivocal denial of civil and political privileges to persons of colour.* These laws import, not merely an adjudication of an abstract principle, but the application of a constitutional rule, by a co-ordinate branch of the government, to a real case, and may be likened, on the score of authority, to the judgement of a court of law upon a litigated suit:

Nunquam *lex* aliud, *judex* aliud dixit.

To the strong testimony here adduced, the distinguished author of the "Commentaries upon American Law," has added the weight of his enlightened opinion. "In most of the United States," says he, "there is a distinction in respect to political privileges be- "tween free white persons and free coloured persons of African "blood; and in no part of the country do the latter, in point of

"fact, participate equally with the whites, in the exercise of civil "and political rights. The African race *are essentially a degraded "caste, of inferiour rank and condition in society.*"* To ascribe the rights and offices of citizenship to a class thus situated, is without any example in history, and nothing short, indeed, of an abuse of language. This passage clearly indicates the errour of the one before selected from the same treatise, which assigned by implication, a higher rank to the free negro; and proceeding as it does, from an eminent jurist in a free State, where the claims of the coloured race have such numerous, persevering, and able advocates, it is unexposed to the suspicion of sectional prejudice, and promises a powerful influence in the cause of truth.

The principle here contended for, is supported by a solemn judicial decision, in the court of Appeals of Kentucky, in the case of Amy, (a woman of colour,) *vs.* Smith.† It was there resolved, by the court, that "Prior to the adoption of the constitution of the "United States, each State had a right to make citizens of any per- "sons they pleased; but as the federal constitution does not author- "ize any but *white persons* to become citizens of the United States, "it furnishes a presumption that none other were then citizens of "any State; which presumption will stand until repelled by *posi- "tive testimony.*" Again, says the court, "Roman *citizens* were "the highest class to whom the *jus civitatis* belonged, and the *jus "civitatis* conferred upon those who were *in possession of it, all "rights and privileges, civil, political and religious.* When the "term came to be applied to the inhabitants of a State it necessarily "carried with it the *same signification*, with reference to the priv- "ileges of the State, which had been implied by it, with reference "to the *privileges of a city:* and it is in this sense that the term "citizen is believed to be generally, if not universally, understood "in the United States."

"*This, indeed, evidently appears to be the sense in which the "term is used in the clause of the constitution which is under "consideration.* For the terms 'privileges and immunities' which "are expressive of the objects intended to be secured to the citizens

*2 Kent. Com. p. 258—(note.)
†Littell's Rep. p. 326.

"of each State in every other, plainly import, according to the best "usage of our language, something more than those ordinary rights "of personal security and property, which, by the courtesy of all "civilized nations, are extended to the citizens or subjects of other "countries, while they reside among them."—Further: "*Free ne-* "*groes and mulattoes* are almost every where considered and trea- "ted as a degraded race of people, insomuch that *under the consti-* "*tution of the United States, they cannot become citizens of the* "*United States.*"

Such is the pointed decision of a superiour court in one of the oldest members of the confederacy. We are not aware that its authority has ever been over-ruled or questioned by any judicial tribunal in the United States: it is, therefore, entitled, by that comity which prevails between the States, to the credit of establishing the law upon the question involved in the decision. It must also be conceded that the reasoning of the court is predicated upon a forcible analogy drawn from the Roman laws, and unfolds, in a just spirit, the true derivation of the proper attributes of *citizenship*.

A case involving the same question more recently occurred in one of the inferiour courts of Connecticut. It was an information, filed by the Attorney General, against one Prudence Crandall, "for "boarding and lodging free coloured persons for the purpose of "instruction, not being inhabitants of the State," in alleged violation of a State law. The counsel for the accused, contended, that the law under which the prosecution had been instituted, was repugnant to the constitution of the United States, which secured to the free coloured inhabitants of all the States, the right of ingress and residence in any of them. But the presiding Judge, (Dagget,) charged the jury, decidedly, against this position, and chiefly upon the authority of the learned commentator quoted above. "To my mind" says the judge in his charge, "it would be a perversion of "terms and the well known rule of construction to say that slaves, "free blacks, or Indians, were citizens, within the meaning of that "term, as used in the constitution." The point to be met was still comparatively novel, and one of great delicacy in so northern a section of the Union; yet the charge is pertinent and direct, suited to

the purity and independence of the judicial office, and stands alone, without the bolstering of forced precedents.

While we bear this testimony to the general merit of this decision, we would not be understood as concurring, altogether, in the train of argument by which its conclusion is arrived at. We have before endeavoured to shew that the 1st art. of the constitution, upon which his honour constructs a portion of his reasoning, has no connection with the question he was called upon to decide; nor can we assent to the opinion that the condition of the Indians furnishes an apt illustration of that of the African race, in the United States. With regard to the provision of the constitution,—it aims at no description of citizenship, but merely establishes the standard of federal representation. And as for the aborigines of the country,—however their nomadic habits may unfit them for the local lives of citizens, it is by no means clear that they do not belong, *legally*, as well as physiologically to the *white* race, or that they labour under any incapacity, not growing out of their erratick character, to become American citizens.

The verdict of the jury in Miss Crandall's case was in accordance with the opinion of the court; but on the removal of the cause to the high court of errours, the proceedings below were reversed on technical grounds, and no other decision was pronounced upon the question at issue.

The reader has been apprized that the views of the court, in the case just noticed, have elicited a pungent commentary from the pen of Judge Jay, of New-York, in an essay lately published by him, on "The character and tendency of the American Colonization Society," &c. We now proceed, with brevity, to redeem our promise in relation to the merits of that commentary. This respectable writer and lawyer is evidently an ardent friend of the anti-slavery cause, and whatever deficiency the rigour of criticism may detect in the scope of his argument, a liberal philanthropist may find fully atoned for in the humanity of his heart. With the motives of the writer, pure and elevated as they may have been, we have no concern, but only with the soundness of his logick in expounding the meaning of the constitution, with reference to the question here examined. His reasons drawn from the discussion of

the Articles of Confederation, have already been disposed of; those which he has derived from other sources, yet claim our attention.

The author of the "Inquiry" assumes, upon the authority of the extract from "Kent's Commentaries," (page 20 of this treatise,) that *free coloured persons* are included by the term *citizen*, in the federal constitution. This, we have attempted to shew, is a casual errour in that very instructive and enlightened work, and at issue with the laws and practice of many of the States. It is a *petitio principii* of the clearest character—without any foundation either in the language of the constitution, the distribution and exercise of the sovereign power, or the general understanding of the people.

The Connecticut Judge is censured, by his reviewer, for doubting "that free blacks are styled citizens in the laws of congress or any of the States," and it is tauntingly added, "it would seem thus that men with *black skins* cannot be citizens unless the *laws expressly declare* them to be so." Had the writer been more attentive, we will not say to the forms of courtesy but to the origin and continuous history of the American community, he would have suppressed this sneer. From their first introduction into this country, and until they spread over the whole continent, the negro race were reduced to slavery, by the white population, on account, not of their foreign nativity or descent, but of their *colour* and moral degradation; and as these traits of inferiority were in no degree diminished by their state of bondage, nothing short of *express legislation* could, at the establishment of the government, have so effectually vanquished the antipathy of the dominant race towards them, as to admit of their enjoying the political and civil privileges of the State. Indeed, the experience of the nation has proved that *legislation itself*, seconded as it has been by the arm of charity and benevolence, is inadequate to raise even the most eminent of the coloured ranks to a footing of equality with the whites. It is for the reviewer to explain how it happened that these portions of his country's history were either overlooked or undervalued in the concoction of his argument.

The zeal and diligence of the learned critick have not been successful in discovering a solitary law of congress that bestows, in distinct affirmative language, the title of *citizen* upon a *black* man. The act of 1803, to which he refers, demands, as we have shewn,

a very different construction; and the inference drawn from the phrase "*free white male citizens*," loosely employed by the act of 1792, for organizing the militia, is forced and inconclusive. It is *forced* because the use of the word *male* does not imply the possession of equal rights and privileges by the *female;* nor does the term *citizen* absolve the *alien* from the duties enjoined by the law. It is also *inconclusive*, for admitting the phrase to be used partially in a *critical sense*, the free blacks were treated, even at that period, in some of the States, as local *citizens*, and might, therefore, with propriety, be so exempted by the law, according to the accustomed policy of the government, from military service. But the phrase is evidently a general positive description, without any tacit admission whatever, in favour of the coloured population.

The writer again affirms, that, "impressed coloured sailors have "been claimed, by the national government, as *citizens* of the United "States; and coloured men, going to Europe, have received passports "from the department of State, certifying that they were *citizens* "of the United States."* This may all be conceded, and grows out of the protective duty of the government, towards all who are subject to its authority, and bound by no allegiance to a foreign power. The term *citizen* is sufficiently exact, under such circumstances, to indicate the *foreign* relation of the individual, and ensure his personal security; but the relation which he sustains, to his own confederated government, will not admit of that description, unless it is sanctioned by the concurrence of the separate State powers. This point has been before enlarged upon, at suitable length.

The general question before us, is unaffected by the peculiar polity of any particular State or States. We are fully apprized that, in New-York, and some of the other States, the coloured ranks are allowed, to a certain extent, the rights and immunities of the white community; but, as long as the States retain their separate independence, the constitution or statute book of neither of them, can controul the terms of citizenship in the rest; nor can the title of *federal citizen* be allotted to any resident, from a partial regard to the local regulations of the State where he may chance to be domi-

*Jay's Inquiry, p. 43-4.

ciled. The deductions of the author of the "Inquiry," from this source are, therefore, foreign to the subject upon which we are engaged.

We take leave of this sensible writer, under a lively conviction that his intellectual perceptions have been insensibly warped by the predilections of his breast, and that a calm revisal of this part of his essay will conduct his mind to an opposite conclusion.

It has been intimated before, that the true condition of the coloured race receives a farther illustration from the policy that led the States, at an early day, to enact laws against the slave traffick; and that policy was shewn, by evidence cited from their colonial history, to have been dictated by an awakening sense of national freedom and security—prompted by a clear perception of dangers menacing the State in an *overgrown coloured population.* This conservative power of the colonies over the unity and repose of their own citizens, so essential to their welfare, was frequently called into exercise by their respective governments, but was almost as frequently frustrated by the sordid views of the parent country. After the Declaration of Independence, and before the federal exercise of the power under the constitution, it was effectually employed by many of the States, with the countenance and aid of the general government; and the domestick bearing which it has more recently assumed, proves that it cannot, by legitimate construction, be limited, to the mischiefs, merely, of the foreign trade. In the formation of the constitution this power was conferred, concurrently, upon the federal government, by the 9th section of the 1st article. To have parted with it, entirely, would have been an abdication of the right of self-protection on the part of the States, and probably have involved the general government in a course of invidious legislation for the interiour welfare of some of the States that might have engendered jealousy and discord. The power, therefore, was prudently retained by the States, as well as transferred to the common government, and may be put forth, by them, at any emergency, to correct an existing or repel a minatory evil. The possession, by

the States, of this important power of self-defence, is recognized both by the laws of the nation and the decisions of its courts: its existence, we believe, has never been denied; and it is only strange that any can narrow its sound exercise within the bounds of its orignal and proper range, on account, merely, of the changed form of the evil.

The 1st clause of the 9th section of the 1st article of the constitution, provides, that "the migration or importation of such persons "as any of the States, now existing shall think proper to admit, shall "not be prohibited, by congress, prior to the year 1808; but a tax "may be imposed on such importation, not exceeding ten dollars for "each person." This clause, it is contended by the advocates of a restrictive construction, relates altogether to the *foreign slave trade*—as well the reserved prohibitory State power which it implies, as the equally distinct federal power which it delegates. Whatever may be thought of this opinion, at the present day, there cannot be much doubt, that, in the infancy of the government, it was maintained by respectable authority; and its bearing upon the question discussed, may be seen in the fact, that, in proportion as the design of the clause can be confined to the distant slave traffick, are the political claims of the black freemen, in the United States, unaffected by its operation. It must not, however, be forgotten, that even should the power confided by the clause, to congress, be limited to the foreign traffick, it cannot be construed to abridge the pre-existing power of self-protection in the States, which must be co-extensive with the sources of the evil.

The late Judge Addison, in speaking of this provision, says, "it "is well known that the prohibition in view, respected only slaves. "This was universally understood at the time of the publication of "the constitution, during its discussion, and ever since."* If this be the just meaning of the passage, it would seem to have been introduced, mainly, for the defence of the natural rights of the African, with but a secondary reference to the unity and peace of the American people: it would shew the power of congress to be plenary, for the former object, but quite inadequate to the demands of

*See his "Defence of the Alien Act."

the latter. The torrid zone might empty its inhabitants upon our shores until they equalled the number of our white population, and the authority of the general government, although competent to withhold from them the privilege of naturalization, would yet be unable to repel their inroad as *voluntary emigrants*, or prevent their eventual accession, through the power of the State institutions, to a proportionate share of the political power! It would seem sufficient to admit the possibility of such an event to expose the inaccuracy of a construction denying the power to avert it.

The "Federalist" adopts the same strict view of this passage of the constitution, yet notices—with but little deference, it is true, the more liberal exposition of which it is susceptible. It is to be lamented that this branch of its subject has been honoured with so brief a commentary in that standard work.*

Mr. Martin, in his letter addressed to the legislature of Maryland, explanatory of the proceedings of the Federal Convention, maintains, in like manner, that the clause was intended to have a specifick reference to the *slave trade;* but, from a delicate regard to American ears, its language was so framed as to apply, with equal force, to every description of foreigners.† A singular oversight this, indeed—one, if we are to judge from the debates, that seems to have eluded the discernment of all the members who composed that enlightened body. Such, doubtless, was the opinion of the writer of the letter; but that the same sentiment pervaded the majority of the convention, may well be questioned. That the federal government should have been armed, through inadvertence, with authority to prohibit emigration to the country, at a period when all felt the importance of its generous encouragement, is a supposition involving too bold a censure upon the wisdom and circumspection of the men who framed the constitution, to be admitted upon the testimony of any one witness, however respectable. It is apparent, from the very passage of the letter to which we have referred, that the writer, acute as he was known to be, laboured under some misconception of the clause in question. He affirms, that it is so

*"Federalist," no. 42.

†Elliott's Debates, v. 4, p. 35–6.

worded, "as really to authorize the general government to impose "a duty of ten dollars on *every foreigner* who comes into a "State to become a citizen, whether he comes absolutely free or "qualifiedly so, as a servant;" whereas, the language of the provision expressly confines the duty to the *imported class alone*—exclusive, probably, even of servants, according to the popular acceptation of the term. The views of other delegates, upon this point, will not be found to sustain the representative from Maryland.

This strict construction of the clause is, also, partially favoured by the learned author of the "Commentaries on the Constitution of the United States"—a work of eminent authority and great usefulness. After maintaining that the *migration* and importation of *slaves*, was the sole object of the clause, the writer in a future section admits, that "*migration* seems, appropriately, to apply to *voluntary* arrivals, as importation does to involuntary arrivals." These positions appear to us, mutually repulsive: we cannot reconcile them, or account for the incoherent use of the word *migration* to denote the *transportation of a slave*, in any manner consistent with the proved sagacity of the author. The commentary indicates the perplexing effect of conflicting authorities upon a subject which was not deemed of sufficient value to repay the labour of harmonizing them.

This accumulated evidence, receiving its last accession at so recent a period, and from a source so competent as the work just cited, is deserving of high consideration; and, although it may not be demonstrative of the full scope of the clause, it ought to be sufficient, perhaps, to prove that the *slave trade* was its *principal object*. But, that the provision was designed to extend to others, as well as African slaves, may be gathered from testimony equally stringent. It appears, by the journal of the Federal Convention, that the word *migration* was retained in this clause of the constitution, in opposition to an amendment that was offered, omitting it; some specifick meaning was, therefore, attached to it. In the language of Mr. Rawle, "the section has a commercial, moral, and political meaning," and should be construed accordingly. The word *importation* is well understood to refer, solely, to the *slave trade;* but *migration* cannot, philologically at least, have that application. In its

loosest acceptation, it imports a *voluntary change of place;* in its more exact sense. the change is confined to *different parts of the same country.* According to this latter sense, it can have no allusion to foreigners, and in either sense, it is wholly irrelevant to both the foreign and domestick traffick in *slaves*—inasmuch as their change of residence is always compulsory.

In support of the narrow construction, Judge Addison insists, that *migration* was used to correspond with the word *persons*, and is descriptive of the *slave's* passage over land, after his importation or arrival.* Plausible as this explanation may at first appear, it is unquestionably at variance with the true meaning of the passage. It involves the absurdity of supposing that a power to prohibit the sale and consequent transfer of the slaves, might be exercised after their importation had been allowed, and the tax paid; or, that the importation of slaves was taxed for the benefit of the publick treasury, with a punick faith that subjected their proprietor to a heavy penalty afterwards, at the option of the government, in the event of their *migration* or removal.—In answer to a charge made in the convention of Pennsylvania, that *white aliens* were liable to the duty authorized by this section, it was stated by Mr. Wilson, who had been a delegate in the Federal Convention, that the *phraseology of the section was selected with care*, and that the *migratory* class were exempt from the pecuniary burden.† This is the authority of a discerning and conspicuous party to that instrument of government, and shews that the free European, as well as the captured African, was designed to be embraced in the form of words adopted by its framers. Mr. Iredell, who was also a member of that body from North Carolina, replied to an argument on the same point, in the convention of his own State, by saying—"The committee will observe the distinction between the words *migration*, & *importation*. "The first part of the clause will extend to persons who come into "the country as *free people*, or are brought as slaves; but the last "part extends to *slaves* only. The word *migration*, refers to *free* "*persons;* but the word *importation*, refers to slaves, because *free* "*people* cannot be *imported*."‡ This explanation of the clause

*Defence of Alien Act.
†Elliott's Debates, vol. 3, p. 251. ‡*Ib.* p. 98.

was received as satisfactory, and the 9th section was passed without farther debate.

To the foregoing may be added the higher testimony, in the estimation of many, of the resolutions relative to the constitutionality of the Alien and Sedition laws, prepared by Mr. Jefferson, and adopted by the legislature of Kentucky, in 1798; and also, the report of Mr. Madison, upon a series, equally loyal in tenour, adopted in the same year, by the legislature of Virginia. The 5th resolution, of the former set, affirms, that the clause under consideration, *has reference to white aliens* and reserved to the *several States, authority to admit them* until the year 1808; and, the report mentioned, in its comments upon the fourth resolution of the latter series, notices this constitutional argument of the democratick sage, in terms of evident commendation. For the sake of brevity, the reader is referred to these celebrated documents in the 4th vol. of Elliott's Debates. As Mr. Madison has made an ingenious effort to vindicate these illustrious acts of patriotism, on the part of two kindred States, against the charge of nullification, we should be glad to see the acumen that still distinguishes his venerable years, successfully employed in repelling the charge of contrariety between the passage here alluded to in his report, and the exposition of the same clause, in the "Federalist," which publick opinion has attributed to his own pen.*

The interpretation that has been given, in the present view, to this branch of the constitution, by the Supreme court of the United States, in the case of Gibbons *vs.* Ogden, is now the most authoritative—being incorporated with the supreme law of the land.† The Chief Justice, in his elaborate opinion in that case, assents to the position of the counsel for the appellee, that the section under consideration, is an exception for a limited period, in favour of the States, of the *power over commerce*, granted to the general government. He maintains, farther, that the word *migration*, in its constitutional sense, has reference to navigation, as a branch of commerce, and may be viewed as descriptive of "*voluntary arrivals;*" whether the transportation be by *land* or water, or both—and wheth-

*This was written in the lifetime of that distinguished statesman.
†Wheat. Rep. v. 9, p. 1.

er the intercourse be with a foreign nation, or only *between the States*. We extract the annexed passage from his opinion: "*Migration* applies as appropriately to *voluntary*, as importation does "to involuntary arrivals; and so far as an exception from a power "proves its existence, this section proves that the power to regulate "commerce applies equally to the regulation of vessels in transporting *men* who pass from place to place voluntarily, and to those "who pass involuntarily." Again: "the sense of the nation, on "this subject, (commerce) is unequivocally manifested by the provisions made in laws, for transporting goods *by land*, between "Baltimore and Providence, between New-York and Philadelphia, "and between Philadelphia and Baltimore." A mind less liable to errour, in expounding the meaning of the constitution, was, probably, no where to be found, than that of this truly venerable judge; and it is apparent, from his remarks quoted, that the clause to which they relate, comprises in its *commercial* aspect, not merely *slaves*, but *aliens generally*, and even *citizens*. This commercial action of the clause proceeds, exclusively, from the federal power; because the entire control of commerce, in all its branches—saving for the limited period excepted in this clause—was invested in congress, by a distinct provision of the constitution; and this control is, properly speaking, of a *regulative*, and not a *prohibitive* character. But the "*moral and political*" action of the section noticed by Mr. Rawle, and which in a less degree claimed the attention of the court in the above case, has no connection with any other article of the constitution—is wholly *prohibitive* in its nature, and shared by the State authorities as a reserved right. And although, under this bearing, *citizens* are removed from its operation by the 2nd section of the 4th article of the constitution—*persons migrating*, (*voluntarily*, of course, according to the opinion of the Chief Justice,) are, nevertheless, reached by it, or else the word *migration* is virtually expunged from the clause.

That the several States possess a reserved power over the *moral* and *political* objects of the section, in concurrence with a similar power bestowed upon the federal government, may be inferred from other parts of the same lucid opinion, but perhaps, with greater clearness from the following passage of the opinion of the late Jus-

tice Johnson, delivered in the same case: "Although," says he, "the leading object of this section, undoubtedly, was the importa-"tion of slaves, yet the words are obviously calculated to comprise "*persons of all descriptions*, and to recognize *in congress, a power* "*to prohibit*, when the States permit, although it cannot permit "when the *States prohibit*." It may be asked, why was the exercise of the federal power *restrained for twenty years*, if any thing else was intended by the provision, than a temporary concession to the slave holding States; or if any other class than slaves were to be subject to its action? Plausible as this objection to the extent of the power may at first appear, it vanishes when we consider that the *restriction* imposed, was designed to have reference only to the *slave trade*—to the persons imported; and that the evils incident to the contemplated *migrations*, were already so completely within the unrestrained power of the States, as to be incapable of any increased terrours during the continuance of the check, upon the general government. We noticed before, the motives of delicacy and discretion that have, probably, hitherto withheld the common government from the use of this power which the people have left so amply in possession of the several State sovereignties.

Such being the sound exposition of this section of the constitution, the question recurs—who are the *migrants* against whom its *moral* and *political* force is to be directed? We have seen that they cannot be citizens, and yet they are in *voluntary transit*. Are they resident aliens of the white race? Such a supposition would seem to be at war, not only with the uniform policy of the States that sought to swell the number of their *white* inhabitants, but also, with that exclusive discretionary authority to admit aliens to the rights of citizenship, which had been conferred upon congress, by the previous section. Still, however, we are told by the constitutional arbiters of the question, that this very description of persons, are subject to the operation of the clause. But to *what extent* are *they* subject to it? Is not their responsibility confined, entirely, to its *commercial* bearing? were they not a class whom the States, generally, at that early day, eagerly invoked to augment their resources and power—whom many of them favoured with the right of purchasing, holding, and transmitting property—and who, in very

numerous instances, were bound by the strongest ties of blood and sympathy, to their own citizens? Strange indeed then, would it appear, that there should be a specifick power delegated in the constitution to prohibit the privilege of free locomotion, which they had long been enjoying, to persons so essential to the growth and defence of the country, on account of a probable danger, from their presence, to the moral order or political freedom of the States!

But should it even be supposed, contrary to the fact, that white aliens occupied, at the formation of the constitution, a position so obnoxious to the State communities as to make it expedient to clothe the national government with power to abridge the sphere of their movements,—it does not follow, that there were none others of whom equal jealousy was entertained, and from whom, if indulged with unrestrained license, even more serious evils were to be apprehended. That the *coloured population* was so viewed, no unprejudiced mind, that is at all familiar with the history of the country, can deny. The legislative proceedings of Pennsylvania and Virginia, before noticed, afford conclusive evidence of this fact. The complaints of these States, it is true, related, by the necessity of the case, to *slaves*—for the whole negro race of the colonies was then, with few exceptions, held in bondage: but the prospective mischiefs complained of, sprung, not from the incident of enslavement, but from the alienation of feeling inseparable from a *diversity of colour and caste.* Had the servile condition of the blacks occasioned the grievance, the remedy of manumission was at hand, and would, doubtless, have been urged by the opponents of the measures, as a triumphant argument, against their adoption. So shallow a pretence, had it been employed, would have passed unnoticed, as the suggestion of folly, or provoked reproof, as the mockery of insolence. The experience of the country since, has painfully proved, how just was the cause of the anxiety then felt, on account of the increasing numbers of the negro population; if it has not in an equal degree, demonstrated how accidental was its connection with the discontents of slavery.

But what says the constitutional provision itself, upon this point? The persons in view, are there described as *those whom "any of the States shall think proper to admit"*—language that has evident

allusion to past manifestations of feeling, on the part of some of the States, towards a particular class of people, other than citizens—a class, which their future welfare required, should remain liable to exclusion from the limits of those States, according to their own views of policy. To whom, then, can the plain spirit of the section be so applicable as to the coloured race---bond or free? Their disproportionate increase by sudden influx, as a distinct race, unalterably alien in origin, complexion, and character, is the danger to be resisted; and it matters not whence they come, or how free their pretensions or birth. They may be the enslaved victims of an inhuman traffick, from abroad, or the liberated exiles from a sister State, at home---conveyed by forcible *importation*, or voluntary *migration;* still they are of an order essentially alien to the white community, incapable of being incorporated with it, except by destroying its unity, and liable, therefore, to be repulsed by either of the States, as hurtful to their prosperity. Any other conclusion would leave the welfare of the States in greater insecurity than it was before the formation of the Union.

It is worthy of observation, how accurately this theory accords with the policy that has confined the naturalization laws to *white* aliens alone. Had they been extended to the tropical race, they would have come into serious conflict with the settled practice and laws of several of the States, and created the singular anomaly of two distinct classes of black freemen, in the same State---the one occupying a degraded rank, and the other advanced to the dignity of citizenship.

After all, we cannot refrain from recurring to the common understanding of the country, as an irrefragable argument in support of the doctrine here maintained. That understanding cannot be mistaken, and furnishes, upon questions of constitutional law, perhaps, the least fallible guide. It may not be inapt, therefore, to conclude this head with the language of the lamented Marshall, in the case last cited, modified to suit the present subject: "All America understands, and has uniformly understood the word *citizen, to exclude the coloured race.* It was so understood, and must have been so understood, when the constitution was formed. The con-

"vention must have used the word in that sense, because all have "understood it in that sense, and the attempt to extend it comes too "late."*

We are sensible that, in applying the rule of interpretation here advocated, difficulties may arise out of the various shades of colour that pervade the human family; but however embarrassing these may prove, as they can involve only questions of *fact*, they should have no force in determining the *law*. The same obstacle may have opposed the execution of the law of 1804, for the government of the Louisiana Territory, and may be daily presented in the execution of the naturalization laws; but who would assert that these laws were *therefore*, abrogated, or that their plain directions should be disregarded? With respect to the mass of the coloured population, in the United States, the application of the rule will be easy; and where the natural mark of inferiority is so faintly impressed as to leave a decided predominance of the white blood, a liberal judge would hardly feel it a duty to repel the application. The learned commentator, of New-York, remarks, upon this subject, with reference to the naturalization law: "I presume it ex- "cludes the inhabitants of Africa and their decendants, and it may "become a question, to what extent persons of mixed blood, as mu- "lattoes, are excluded, and what shades and degrees of mixture of "colour disqualify an alien from application for the benefits of the "act of naturalization. Perhaps there might be difficulties, also, as "to the copper-coloured natives of America, or the yellow or tawny "race of Asiatics, though I should doubt whether any of them were "'white persons,' within the purview of the law." When we consider that the tawny and olive coloured tribes are usually classed,

*The writer has been informed, by a highly respectable acquaintance, who was a member of the House of Representatives at the time the inhabitants of Missouri applied for admission into the Union, that Mr. Charles Pinkney, in the course of the debate upon that application, avowed himself the author of the section of the constitution, which provides, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" and added, "so help me God, I did not intend it should embrace the *coloured population*."

by naturalists, in one of the subdivisions of the *white* race, we can hardly refrain from doubting, that this opinion of the chancellor is sufficiently liberal for the spirit of the law, which it cautiously professes to interpret.

PART III.

POLITICAL RIGHTS OF THE FREE BLACKS IN PENN'A.

If the foregoing views be correct, it follows, that every State in the Union has the sovereign power of prohibiting the coloured inhabitants of the other States from entering and becoming resident within its bounds. In some districts of Pennsylvania, and in other of the free States, that class is admitted to some share of political privileges. This, however, is a mere gratuity, and often of but transient enjoyment—the suspension of a disability which the constitution imposes, through the tenderness of those who happen to be entrusted, for the time, with its local administration. Extensive as this practice may be, it must still be regarded as one rather of sectional concern, and entirely at the option of the States in which it is tolerated: it never can be supposed to eradicate the defensive authority of those States, and to leave them exposed, at all times, to the pestilent irruptions of the black refugees from others. The *citizens* of any one State cannot avail themselves, at pleasure, of the local advantages of any other State, in defiance of its municipal rules; and much less can *non-residents of a debased rank* arrogate so high a privilege.

But let us briefly consider what is the true political rank, under the constitution, of the *free blacks*, in Pennsylvania?—as it is chiefly to advance the interests of this, his native State, that the writer has entered upon the present INQUIRY. This is a subject that has already produced some speculation, and upon which it is known,

there are different opinions entertained by intelligent men—a fact that has occasioned us some surprise, as the data upon which our judgement is to be formed upon the question, are singularly ample and demonstrative.

On account of the smallness of their numbers, during the proprietary government, there are but few references to the free coloured inhabitants of the Province, in any of its early legislation. From these, perhaps, nothing can be gathered that is decisive of their claims to membership in the body politick. It was not until after the revolution, when, by their increase, they had acquired some importance in the State, that they came to be the subject of specifick legislative notice. But, from that era, whether we form our opinion upon the general sentiment of the community or the manifest spirit of its laws, it will be difficult to avoid the belief that they have no just claim to the rank of citizens.

The law of 1712, before alluded to, may not be unworthy of passing attention, in this connection also. It was enacted, as we are informed by the preamble, to prevent the *dangers incident* to a large negro population, and under the auspices of rulers whose minds were strongly imbued with the doctrine of equal rights among all the tribes of mankind. It must be acknowledged that the provisions of this statute as clearly indicate a disposition, on the part of the whites, to preserve themselves a distinct and separate commonwealth, as the penalty which they inflict upon the hapless African illustrates the mildness and humanity of the provincial government.*

The frame of government digested for the province by Penn, conferred the electoral privilege—which is commonly esteemed the highest evidence of genuine political freedom—upon the resident *freemen;* and the laws accompanying the charter to the proprietary ascribed that character to every inhabitant "*who pays scot and lot,*" and "every person who hath been a *servant or bondsman, and is free by his service.*" There being, probably, none of the African

*The black intruder was liable to be *sold*, under this law—a rigour for which there is some apology in the formidable state of the slave trade, at that time, and the heartless thirst for gain, in the parent country, that hazarded the very existence of her colonies, by the prosecution of that detestable traffick.

race in the province, at that early day, who were not in slavery, *they* could not be considered as falling within the description of these laws; and, indeed, had there been a manumitted class, the language employed evidently contemplates a freedom acquired by the *expiration of a contract for a limited service.* This construction is plainly just, but receives corroboration, as well from the 29th section, following, in relation to servants, as from the entire omission of the code, notwithstanding the solicitude of its authors to provide for all classes, to notice the wants of the enslaved race.

That the coloured man is clothed with the political rights and privileges of the white man, is an opinion, which, as far as we are informed, at no period generally prevailed in Pennsylvania. On the contrary, he has always been viewed as a *quasi* freeman, only—deriving his imperfect freedom from the will of the white community, and enjoying it under their government rather by *toleration* than *right.* His occupation is usually menial; his social and civil grade below that of the meanest white man; and, by the stern law of common consent, he is absolutely ineligible to the pettiest office—an incapacity utterly at variance with the rights of citizenship, under a republick, where stations of profit and trust are, politically speaking, accessible to the whole body of citizens.

The new system of government that was adopted by the people of the State, in the year of the Declaration of Independence, breathes the same spirit. It was formed by a convention in which the coloured class had no representation, either as electors or as a numerical portion of the constituent body. The first chapter provides, "That all elections ought to be *free*, and that all *freemen*, "having a sufficient evident common interest with, and attachment "to the community, have a right to elect officers, or be elected into "office:"* and the 16th section of 2d chapter, that "every *freeman* "of full age, who has resided in the State two years, and paid pub-"lick taxes, *shall enjoy the right of an elector.*" To ascertain the extent of the application of the word *freeman*, in this latter passage, it must obviously be taken in connection with the qualifying language used in the previous one; and it would follow, that no

*Conventions of Pennsylvania. p. 56.

person could be considered as coming under that denomination who had not the *common interest and attachment* there required. The coloured ranks, being almost universally in a state of slavery, cannot, with any reason or fairness, be pronounced within the purview of this clause; nor even supposing them to have been *free*, were their characters at all answerable to the description here furnished. Were they not then, and are they not still, a *disinterested* and *disaffected* class? How could he be supposed to feel a *common interest* with a society whose interests he is doomed to subserve as an inferiour? and where was the ground of his *attachment* to the government, when the reward which it was destined to meet, was social and civil degradation, and exclusion from all share in the honours, the offices, and profits of the State? The only patriotism to be relied upon, boasts, not merely of the impartial protection of the government, but of an equal share in the administration of its powers, and never can be supposed to animate the bosom of a depressed class, suffering under legal restrictions, and deprived of a voice in the councils of legislation.

The laws that were passed soon after the adoption of the new frame of government, for the purpose of establishing its authority over the people, have, also, a manifest reference to the *alienated* condition of the *coloured* population. The inhabitants of the province having just been released from subjection to the British crown, it was judged expedient to require some legal test of their fidelity to the independent government. For this purpose laws were enacted in several successive years,* requiring the inhabitants to take an oath of allegiance to the government; but these laws were expressly confined to the "male *white* inhabitants." Now, we would ask any candid mind, to account for this exemption of the coloured race upon any principle consistent with their rights as *free citizens*. Unless it be preposterously assumed as a testimony of their superiour loyalty to a government which they had no agency in constructing and were to enjoy none in administering, it can only be received as conclusive evidence of their political disfranchisement. These laws were afterwards repealed by the act of 1789, for abol-

*1777, 1778, 1779. See Dall's Edition of Laws.

ishing tests, and of course in no wise affected the condition of the coloured race, who were expressly absolved from their operation.

The act of 1780, that put an end to the institution of slavery in the commonwealth, confers some privileges, also, upon the black freeman. When accused of crime he is allowed, by it, the advantage of the same rules of trial that are applicable to the white man. But here the favour ceases; his civil and political incapacities, so familiar in practice, and in part, so distinctly recognized by subsequent legislation, were permitted to remain unaltered—discriminating his rank by a line broad and deep, from that of the white citizen.

It was after these solemn and repeated declarations of the sovereign will of the commonwealth, respecting the political grade of its coloured inhabitants, that the present constitution of Pennsylvania was formed. After the manner of the federal constitution, it furnishes us no definition of the words *citizen* and *freemen*, employed in it, but leaves them to be understood according to their *established acceptation*. That acceptation, we have briefly endeavoured to shew, has *exclusive reference to white residents*. It need hardly be averred, that the black class had no representative of their own colour in the convention that formed the State constitution, and although, like unnaturalized foreigners, they may be included by the language of that instrument in the constituent body, we may look in vain into it for a provision advancing them to the rights and immunities of citizenship.

If there is any remaining legal evidence that can add to the force of these views, it is the construction given to the constitution by the legislature, on the subject of the militia system. The constitution provides, by the 11th section of the 6th article, that "the *free-* "*men* of this commonwealth shall be armed and disciplined for its "defence." The section is imperative and without any discrimination of classes or colour; yet the legislature in executing its command, has passed laws restricting the duty of a soldier to "*white* male persons." Here we have another legal exemption of the coloured race, from an onerous duty required of the white population. Why this partiality in favour of a hardy and robust people? Why this unequal apportionment of the burdens of the State, in violation

of the express injunction of the constitution, if the term *freemen*, in the section cited, comprises the coloured inhabitants? It is rare, indeed, that evidence so forcible and pointed is brought to bear upon questions of constitutional law, and when it is honestly weighed in connection with the numerous disqualifications to which the free black is known to be subject in practice, we cannot, under a due sense of responsibility, withhold from it our conviction.

In the outset of this part, we alluded to a prevalent custom in some sections of the State, of admitting coloured freemen to the elective franchise. To fault the generosity of this custom, forms no part of our present object; but we hesitate not to pronounce it destitute of all legal foundation. The qualifications that entitle to that valuable property of the citizen, the black is not only unpossessed of, but without the capacity to attain. Enjoying the protection of the government and laws, over both his person and property, the common tribute of the resident and his property may be exacted in return, without affecting his political grade. A law, higher than human, connected, under a permissive Providence with fortuitous causes, infringing the natural rights of his race, has, under the existing government of the State, effectually, if not permanently, debarred him from the rank and privileges of a constitutional citizen.

The provisions of a law that would afford an adequate safeguard to the State, against the incursions of the coloured outcasts from other States, we venture not to prescribe. The subject will, doubtless, demand much deliberation, as the end in view, is one both of difficult and painful accomplishment. Effective measures may, probably, require an infusion of rigour but little short of that which the policy of the South has deemed necessary, to drive the unhappy exiles from their native land. In addition to the penal laws, already in force in some of the Southern States, against the free negroes, projects are constantly springing up, in others, for expelling them from their limits. Let Pennsylvania then, be watchful of the dark cloud that threatens to obscure her brightness. Let her stand upon the defensive against these insidious attacks upon her welfare, and by speedy and energetick action, secure the benefits of her rising greatness for the enjoyment of her own citizens, unshared by an alien, servile and worn-out population of other latitudes.

The writer wishes it to be borne in mind, that in expressing the foregoing views, he had no predilections to gratify—no favourite theory to sustain, or project to further, separate from the general welfare of the American community. His inquiries have been guided, solely, by an earnest regard to truth; and the conclusion to of which they have led, has been adopted more with feelings of reluctance than cordiality. The situation of the coloured race in the United States is deeply unfortunate, and addresses a thrilling appeal to the sympathies and kindness of their superiours in fortune, holding them in different degrees of subjection. But that situation, deplorable as it is, must, we are persuaded, ever continue to be, under the present government of these States, one of civil and political inferiority. Should the competent expounders of the laws chance to decide that the free negro is entitled to the privileges of citizenship, *cui bono* the decision? the law of popular sentiment—always transcendant in a republick—would speedily reverse it in practice. The distinction of the two races is a *natural* one, converted by accidental causes to the prejudice of the black: *artificial* rules may disaffirm, but they can never obliterate it. We consider of no account supposed physical and moral differences that unfold themselves only to the vision of a sectional philosophy; but the *colour* of the African, although not debasing in itself, has become, by circumstances, irremediable at this day, here, a badge of servitude, and must forever, we believe, prevent any general amalgamation of the races. This is, indeed, a very important subject, wholly distinct from the one examined in the preceding pages, and not likely to be ever settled by abstract discussion. It pervades the cherished affections of the breast---entwines itself with our habits of life and education,---and, by the very force of its moral impression, irresistably sways the judgement. Indeed we cannot reason upon it: no sooner is it broached than *feeling*, consecrated and quickened by the tenderest relations, usurps the power of decision and retains it indignant and unmoved.

So revolting is the idea of merging the distinction between the white and coloured population, in a *social union*, that even the ardent abolitionist deprecates it; yet the propriety of emancipating the slaves, and admitting them, when free, to *political* and *civil*

rights, is earnestly insisted on.* We have no feeling towards the coloured class that is not blended with a lively sense of humanity and justice; but we have a strong conviction that if the constitution could be so amended as to admit of their advancement to the rights and privileges of the white community, the favour would, in due time, be followed by as close an intimacy between the two classes, as wealth, good morals, and education now produce between the different circles of society. We have already examples, sufficiently numerous, of low bred profligates forcing alliances with females who are the pride and ornament of the communities in which they move: These are among the evils incident to the structure of the best regulated social state. Still, however, the affianced parties are of the same race and colour, and their personal dishonour may be forgotten in the merit of their descendants. But when an union of the two races results from the limited intercourse already permitted between them by the custom of society, and the mark of disgrace becomes transmissible, what do we find in the walk or character of its innocent bearer to sooth the sorrow which the event occasioned, or represent the birth and standing of those whom the misfortune has overtaken? We regret to see such repulsive notions of equality espoused by discerning minds in this country. They may well be fitted to effect the purposes of foreign incendiaries, whose aim is to unsettle the principles of our social order; or to reign in the meridian of Hayti, where they are habitually realized among a mixed and licentious population; but they have nothing germane to the habitudes of the American people, either in thought, feeling, or action, and we trust, never can obtain a permanent foot-hold upon their soil. Judging from the present state of opinion upon this subject in the country, there is but little ground for reasonable anxiety. It is not probable that the requisite number of States will ever concur in an amendment of the constitution that threatens the nation with such odious consequences; and such of the individual States as may choose to encounter the evil from motives of humanity or policy, will be apt to furnish an example sufficiently monitory to deter the remainder from its imitation.

*Jay's Inquiry, p. 148.

But, it may be asked, is there no kind or generous provision to be made for the emancipated black? Without feeling obliged to answer a question that has so frequently shaken the land, we have no disposition to evade it. The African belongs to a tribe of people that have sustained the most grievous injury at our hands, and their case demands, therefore, every practicable reparation. But the indemnity required, we do not believe, can either be bestowed or enjoyed under the government of the United States. We would point this unfortunate race to the encouraging examples of the oppressed in other lands, who sought and obtained upon a foreign shore, the freedom and comforts that were denied them in the country of their birth. The exodus of the Israelites, from Egyptian bondage, was conducted under Divine auspices, and secured to them a free and prosperous government—abounding in resources and power. The appalling obstacles that opposed their progress, are familiar; but the noble enterprize overcame them all, and has handed down an instructive lesson to future ages, for the benefit of the injured and abused subject. So the gallant adventurers, who, apparently under the same unerring guidance, fled to these shores, and landed at Plymouth and Powhatan, were refugees from oppression in the home of their nativity, and sailed in quest of a region where they might erect the standard of freedom, and exult in the blessings of self-government. The perils and hardships to which they were doomed, forms the brightest page in the history of their adopted country, and addresses another powerful exhortation to all who are suffering under the yoke of a consolidated tyranny, in any form—who are capable of setting a just value upon liberty, and willing to make the efforts necessary to its achievement.

Considering the alluring offers of a free government and a smiling home in the Liberian Settlement, that are made to the coloured freeman of the United States, it appears not a little strange that they should be spurned by him. The fact either evinces a want of the requisite moral courage to govern himself---a pitiable incredulity---or a natural proneness to the grovelling servile relation which he here occupies. He is tempted there by all the high privileges of political and civil freedom, from a land of servitude and jealousy; he is enticed by a fee simple estate in a tract of land of inexhausti-

ble fertility, capable of being enlarged and improved by the acquisition of his industry; he is invited by all the moral associations connected with the climate and country of his ancestors; by the lucrative pursuits of commerce and the arts, and by every prospect that can ensure stability and happiness to a contented and flourishing community. When we contrast these powerful attractions with the hazards and sufferings that frowned upon, but not to dishearten, other colonists, and especially those who planted themselves upon the howling and inhospitable soil of America, we cannot but look upon the "homeless Lybian" as the victim of unfortunate delusion, or as destitute of every manly aspiration that adorns and dignifies humanity.

Regarding, as we do, the provision held forth by the Colonization Society, and its auxiliaries, as the only safe and practicable relief for the African race in this country, it seems to us important in a high degree, to the interests of both the white and coloured communities, that the latter should be duly impressed with the advantages thus held out to their choice. Let this be effected, and with it, let an adequate proportion of the publick revenue be applied in aid of these laudable institutions, and the manumitted slave will be no longer an outcast and stranger in the land of his nurture, but the proud and happy possessor of an independent and comfortable home.*

*We have read the Essay on Slavery, by professor Dew, with that satisfaction which a performance so elaborate, so ingenious, and yet so candid, cannot fail to produce. He has endeavoured to shew, by arithmetical calculation, that the colonization scheme can never sensibly diminish the coloured population of the country, on account of the *immense expense that must be incurred in the purchase and deportation of the slaves, and the stimulus that would be afforded to the domestick traffick, in them, by this new outlet.* The learned writer is, probably, mistaken in both these particulars. For, with regard to the *expense* supposed, in the great majority of instances, the colonists have been emancipated *gratuitously*, and we believe, continue so to be, greatly beyond the means of transportation at the command of the societies. And as to the fresh domestick supplies, which it is imagined would follow this foreign drain, they cannot, by the laws of trade, be attendant on a system of manumission, without reward; and if they were, the co-operation of the States, or the power of the general government, could restrict the internal commerce, in slaves, to the necessary extent, or even prohibit it altogether.

THE END.